indicate how the decision must always be reached. In some cases the process of balancing complexes of results may have long ago resulted in a crystallized rule behind which the courts rarely look to regard the substance. This is doubtless the case with a method of competition so anti-social as violence. But new cases will arise that will fit under no rules, or analytical counsel may question the old. Then courts must seek fundamentals. In particular they must ask whether trade competition in the type of case before them is worth more than it costs.[27] If the answer is not in the affirmative, trade competition is not a justification.[28]

It may be doubted whether a court is competent to apply a rule so broadly framed as the above. When, for example, in the field of labor disputes, a court allowed trade competition to justify a strike for higher wages [29] but not a secondary boycott [30] for that purpose, was it really competent to determine that the compromise on the question of wages arrived at through a struggle thus limited would be the one socially most desirable? And while, of course, some of the cases in which trade competition is offered as a justification are so clear that there could scarcely be error,[31] in the main there is presented to the courts a vast medley of problems where the considerations are nicely balanced and where the final decision should be preceded by thorough and extended investigation, and must depend on views of expediency, policy, social and economic theory; problems, in short, that call for law making rather than law declaring. In this field the legislature should be exhorted to act.[32] But if the problems press for decision before legislative aid arrives, the courts, keeping in mind fundamental considerations, should deal with them.[33] For a refusal to act decides something as clearly as does the issuance of an injunction.

JURISDICTION TO CONFISCATE DEBTS. — A sovereign in the exercise of his war powers can confiscate all property of the enemy found within

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[27] In the recent case of Gottlieb *v.* Matchin, 191 N. Y. Supp. 777 (1921), picketing, although generally legal in New York, was enjoined in the case of a strike of the employees of a milk company. The danger to the health of the community and the particular hardship on invalids and children were given by the court as the persuasive considerations. This is a striking application of the mode of attack argued for above.

[28] In the field of monopoly the distinction between fair and unfair methods of competition has long been seen to turn on the desirability of the results which the practice in question will achieve. See W. H. S. Stevens, "Unfair Competition," 29 POL. SCI. QUAR. 282; CLARK, CONTROL OF TRUSTS, 103.

[29] Karges Furniture Co. *v.* Union, *supra*.

[30] Auburn Draying Co. *v.* Wardell, 227 N. Y. 1, 124 N. E. 97 (1919).

[31] Mr. Albert M. Kales apparently believes that the courts customarily attempt nothing beyond such cases. See the "Prefatory Note" to his CONTRACTS AND COMBINATION IN RESTRAINT OF TRADE.

[32] " . . . government, politically organized society, should meet each emergency requiring alteration of municipal law by the employment of such governmental agencies as in their nature are best suited for the purpose." *Per* Fred F. Lawrence, "Precedent *vs.* Evolution" 12 MAINE L. REV. 169, 171.

[33] See Fred F. Lawrence, *supra*, at 175.

his jurisdiction.[1] The right to confiscate debts is included.[2] But in modern times, however much this may be practiced as a matter of military expediency, civilized nations, as a matter of international law, have generally abandoned the right to confiscate debts due to private enemy individuals.[3] The United States has always maintained the right to confiscate debts[4] in wartime, but has exercised it only in qualified form. During the Revolution, some of the states offered to give a valid discharge if debts due to enemy individuals were paid to the state.[5] In the Civil War, credits likely to be used in aiding the Confederate cause were confiscated.[6] In the World War, the Alien Property Custodian was authorized by the President, under the Trading With The Enemy Act,[7] to require that debts due to alien enemies be paid to him.[8] But

[1] See Brown *v.* United States, 8 Cranch (U. S.) 110, 122 (1814); Miller *v.* United States, 11 Wall. (U. S.) 268 (1870); and see 1 HALLECK, INT. LAW, 3 ed., 532, 533. So, *a fortiori*, property may be seized and sequestrated. Central Union Trust Co. *v.* Garvan, 254 U. S. 554 (1920). And so in conquered territory enemy property may be seized as booty. Debts are sometimes so seized. See G. G. Phillimore, "Booty of War," 3 J. COMP. LEG. 214, 219, 227; 28 YALE L. J. 478. Mere conquest, however, does not operate to change individual rights in property, although it is in the power of the conqueror so to do. See United States *v.* Percheman, 7 Pet. (U. S.) 51, 86 (1833); McMullen *v.* Hodge, 5 Tex. 34 (1849). See also Berkeley Davis, "Confiscation of Property in Warfare," 19 LAW NOTES (N. Y.) 85, 86.

[2] See Ware *v.* Hylton, 3 Dall. (U. S.) 199, 226–231, 263–266 (1796); Fritz Schultz, Jr., Co. *v.* Raimes & Co., 99 Misc. 626, 164 N. Y. Supp. 454 (1917), aff'd 100 Misc. 697, 166 N. Y. Supp. 567 (1917).

[3] See Brown *v.* United States, *supra*, at 123; United States *v.* Klein, 13 Wall. (U. S.) 128, 137 (1871); Lamar *v.* Browne, 92 U. S. 187, 194 (1875); Stöhr *v.* Wallace, 269 Fed. 827, 839 (S. D. N. Y., 1920); United States *v.* Capital Stock, 5 Blatch. 231 (Circ. Ct., S. D. N. Y., 1865). See 1 HALLECK, INT. LAW, 3 ed., 533–538; 28 YALE L. J. 478; HAGUE CONVENTION (1907), LAWS AND CUSTOMS OF WAR ON LAND, Art. 46, 36 STAT. AT L. 2306; Art. 53, 36 STAT. AT L. 2308. But see Berkeley Davis, *supra*.

[4] See Brown *v.* United States, *supra;* Miller *v.* United States, *supra*.

[5] *Cf.* Camp *v.* Lockwood, 1 Dall. (Pa.) 393 (1788). See 7 MOORE, DIG. INT. LAW, 310.

[6] See Acts of Aug. 6, 1861, and July 17, 1862, 12 STAT. AT L. 319, 589. The Act of 1862 included debts. See The Confiscation Cases, 20 Wall. (U. S.) 92, 94 (1873). But only the property of adherents or aiders of the enemy could be confiscated. Miller *v.* United States, 11 Wall. (U. S.) 268 (1870); United States *v.* Capital Stock, *supra*. Proceedings were against the debtor, and not *in rem*. Phoenix Bank *v.* Risley, 111 U. S. 125 (1884), affirming Risley *v.* Phenix Bank, 83 N. Y. 318 (1881); Chapman *v.* Phoenix Bank, 85 N. Y. 437 (1881). See 7 MOORE, *op. cit.*, 294. It has been suggested that these acts were not real confiscation acts but only penal statutes punishing treason. 28 YALE L. J. 478, 481. But the Supreme Court has held that pardon for treason did not invalidate a prior seizure; the confiscation being not a punishment for treason, but the exercise of a belligerent right against a public enemy. Semmes *v.* United States, 91 U. S. 21 (1875). And the acts were held constitutional as an exercise of the war power of the United States, and not as an exercise of the municipal power in punishing an offense against the United States. Miller *v.* United States, *supra*.

[7] See 40 STAT AT L. 411. Amended, 40 STAT AT L. 459, 460, 1020; 41 *id.* 35, 977.

[8] Congress may in wartime provide for the sequestration of enemy-owned property. Central Union Trust Co. *v.* Garvan, *supra;* Fischer *v.* Palmer, 259 Fed. 355 (M. D. Pa., 1919). The Act as amended properly includes choses in action. Streb *v.* Chatham & Phenix Nat. Bank, 108 Misc. 368, 178 N. Y. Supp. 309 (1919). See also Kohn *v.* Kohn, 264 Fed. 253 (S. D. N. Y., 1920) (debts); Stoehr *v.* Wallace, 255 U. S. 239 (1921) (stock certificates); Salamandra Ins. Co. *v.* N. Y. Life Ins. and Trust Co., 254 Fed. 852 (S. D. N. Y., 1918) (chose in action against special fund), commented upon 28 YALE L. J. 499. But see Am. Exchange Nat. Bank *v.* Palmer, 256 Fed. 680 (S. D. N. Y., 1919).

this was for custody only, and was sequestration, not confiscation.[9] Absolute confiscation of debts is still attempted during insurrections in the smaller nations. What jurisdiction must be had over the parties to make confiscation valid?

A sovereign having jurisdiction over the person or property of the debtor has power to take his property equal to the amount of the debt. But this would be a mere act of tyranny, unless at the same time his obligation to the creditor were validly extinguished so that he would not have to pay over again in another jurisdiction.[10] The only way of effecting this result is to bring the creditor into the same or related proceedings. If the sovereign establishes a claim against the creditor which another jurisdiction will recognize, he may then proceed against the debtor, take the debtor's property in satisfaction of his claim against the creditor, and in the other jurisdiction the creditor could not then assert that the debtor still owed the debt to him. This proceeding is exactly the equivalent of garnishment. As a practical matter, in wartime the sovereign could never proceed in court against an enemy creditor who was outside his jurisdiction; and so the sovereign could validly assert a claim only if the enemy creditor were within the jurisdiction. This requisite was satisfied in the federal confiscation of debts due Confederate creditors, in the Civil War, for the United States never relinquished jurisdiction over the whole country. It was often not satisfied in the World War sequestrations, where debts due absent Germans and Austrians were paid to the Alien Property Custodian; but as no confiscation was attempted, jurisdiction over the creditor was unnecessary. However, in spite of this necessity of the sovereign's having a valid claim binding upon the creditor in other jurisdictions, in order to relieve the debtor from future liability, the American courts have paid little attention to the creditor, although they have insisted upon proper procedure against the debtor.[11] This was a result to be expected in the United States, where the same loose doctrine prevails as to garnishment of choses in action.[12] Foreign sovereigns would be justified in such a case in saying that no

[9] Although originally the purpose of the Act was merely to sequester enemy property during the war, by an amendment allowing the sale of property and retention of the proceeds by the Custodian, German ownership of American industries was as far as possible abolished. See A. Mitchell Palmer, "The Great Work of the Alien Property Custodian," 53 AM. L. REV. 43, 51 *et seq.;* A. Mitchell Palmer, "Enemy Property in America," 1919 PA B. A., 259, 275. This did not amount to absolute confiscation; but some anxiety has been felt as to whether such proceeds might eventually, contrary to modern practice, be confiscated. See A. W. Lafferty, "Should America Return Private German Property?" 15 ILL. L. REV. 79; 28 YALE L. J. 478.

[10] Even the American courts recognize that in order to have a valid confiscation of a debt the debtor must be exonerated from further liability. Thus seizure of Confederate treasury notes was held not to amount to a sequestration of the debts of the bank, since the notes were issued in violation of law and their seizure would not absolve the debtor from further liability. Nelligan *v.* Citizens' Bank of Louisiana, 21 La. Ann. 332 (1869)

[11] Miller *v.* United States, *supra;* Alexandria *v.* Fairfax, 95 U. S. 774 (1877); Phoenix Bank *v.* Risley, *supra*

[12] Chicago, Rock Id., & Pacific R. R. *v.* Sturm, 174 U. S. 710 (1899); Harris *v.* Balk, 198 U. S. 215 (1905). See Miller *v.* United States, *supra,* at 297. See Joseph H. Beale, "Jurisdiction *In Rem* to Compel Payment of a Debt," 27 HARV. L. REV. 107, 111.

valid discharge of the debt had been given, and that the attempted confiscation amounted only to a seizure of the debtor's property.

This would have to be the only significance of an attempted confiscation of a debt by one who was not a sovereign but a mere insurgent; unless he had legally proved his claim against the creditor so as to bring the case within the proper principles of garnishment.[13] Seizure of the money might be justified as an act of warfare, where necessary for the prosecution of hostilities, but could not amount to confiscation of the debt, since even if the creditor were in the neighborhood the rebel leader is invested with no sovereign powers,[14] and would not have the jurisdiction of a sovereign over the creditor to establish a valid claim against him. If, indeed, the insurgents succeeded in overthrowing the established government, and were recognized by another state so that the recognition related back to the inception of insurgency,[15] previous acts would be validated and regarded as acts of a sovereign; [16] a confiscation of a debt by the insurrectionary power would be effective if the creditor were within the jurisdiction at the time of the seizure. If the rebellion failed, all acts of assumed sovereignty done in aid of it would be regarded as null,[17] and the debtor would have no defense when sued in another jurisdiction.[18] Failure to recognize the revolutionary government by another state, if the debtor is sued there, works the same result.[19] Thus in a recent case [20] a Texas court held the debtor liable to the creditor in Texas, although the leaders of the Calles-Obregon insur-

[13] See Joseph H. Beale, *supra*, at 116.

[14] It has been suggested that each authority in fact supreme over a part of the country, with some probability of permanence, is the head of an independent state. See Thomas Baty, "So Called 'De Facto' Recognition," 31 YALE L. J. 469, 484. It is true that in some cases duties paid to insurgents were considered properly paid and were not required to be paid again. See 1 MOORE, *op. cit.*, 49. And *cf.* United States *v.* Rice, 4 Wheat. (U. S.) 246 (1819); Ford *v.* Surget, 97 U. S. 594 (1878); Thorington *v.* Smith, 8 Wall. (U. S.) 1, 8 (1868); Mauran *v.* Ins. Co., 6 Wall. (U. S.) 1 (1867). Mr. Cass in 1858 advanced the claim that acts of insurgents were lawful acts of sovereignty when done, irrespective of whether the movement finally succeeded or failed; but the United States later dropped the cases, recognizing that such a claim could not be sustained. See 1 MOORE, *op. cit.*, 43, 44. See note 17, *infra*.

[15] See 35 HARV. L. REV. 607.

[16] Underhill *v.* Hernandez, 168 U. S. 250 (1897); Oetjen *v.* Central Leather Co., 246 U. S. 297 (1918); Terrazas *v.* Holmes, 225 S. W. 848 (Tex., 1920). See Williams *v.* Bruffy, 96 U. S. 176, 185 (1877). And see 18 MICH. L. REV. 531.

[17] United States *v.* Sutter, 21 How. (U. S.) 170 (1858); United States *v.* Rose, 23 How. (U. S.) 262 (1859); Texas *v.* White, 7 Wall. (U. S.) 700 (1868); Williams *v.* Bruffy, 96 U. S. 176 (1877); Dewing *v.* Perdicaries, 96 U. S. 193 (1877). See 18 MICH. L. REV. 531.

[18] Williams *v.* Bruffy, *supra;* Stevens *v.* Griffith, 111 U. S. 48 (1884) (legacy); Keppel *v.* Petersburg R. R. Co., Fed. Cas. No. 7722 (Circ. Ct., D. Va., 1868) (dividends on stock); Vance *v.* Burtis, 39 Tex. 88 (1873).

[19] See 18 MICH. L. REV. 531. But see 35 HARV. L. REV. 607. And see Thomas Baty, *supra*, at 472.

[20] Russek *v.* Angulo, 236 S. W. 131 (Tex., 1922). — The plaintiff held a certificate of deposit issued by the defendants, bankers in Chihuahua, Mexico. A revolt was begun against the established government, and the insurgent authorities, having control of Chihuahua, assumed to confiscate the plaintiff's deposit on the ground that the plaintiff was an enemy of the insurgent party. The defendants paid over the money and were given a receipt purporting to release them from their obligation. The revolutionary party was successful in gaining control of the republic of Mexico, but had not been recognized by the United States when the plaintiff sued the de-

rection in Mexico had assumed to confiscate the debt. The Obregon party, though subsequently acquiring control of Mexico, had not been recognized by the United States at the time of the decision. The court properly interpreted the confiscation as merely a seizure of the debtor's money, and not a proper proceeding in the nature of garnishment. The striking thing about such a case is that a judgment against a debtor where the creditor has had no opportunity to be heard (and thus in effect the same as this act of attempted confiscation by the insurgent leaders), if rendered by a state court in the United States, would be upheld by the Supreme Court as a valid proceeding in garnishment.[21]

THE CONFLICT OF LAWS RELATING TO THE CREATION OF COVENANTS FOR TITLE. — When persons domiciled in one state execute in that state a deed whereby one of them purports to transfer to the other title to land situated in another state, the law of the *situs* determines what interests in the land, if any, are created thereby.[1] If by the law of the *situs* the words used in the conveyance import the usual covenants for title, will that law still control, or should the courts look to the law of the place where the deed was made, or to that of the domicil of the grantor? A recent California case,[2] in deciding this question, held that as to a covenant for quiet enjoyment the *lex rei sitæ* governed.

Since no other sovereign than that of the *situs* can exercise dominion over the land, that sovereign must have power to impose whatever requirements it may deem necessary as conditions precedent to the acquisition and transfer of title or any other rights therein. But, on the other hand, the law of the *situs* can have no extraterritorial effect and therefore "cannot control personal covenants, not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it." [3] If a man is held to have made a promise, it must be either because the law treats the mere doing of an act as such, or because he has used promissory words. The act of making a deed may have two effects: first, to create an interest in the land, and, second, to create a personal obligation on the part of the grantor. Whether a deed does have the latter effect should be determined by

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fendants in Texas on the certificate of deposit, and recovered. *Held*, that the judgment for the plaintiff be affirmed.

[21] See Note 12, *supra*.

[1] New Haven Trust Co. *v.* Camp, 81 Conn. 539, 71 Atl. 788 (1909); Middleton's Trustee *v.* Middleton, 172 Ky. 826, 189 S. W. 1133 (1916); International Paper Co. *v.* Bellows Falls Canal Co., 91 Vt. 350, 100 Atl. 684 (1917).

[2] Platner *v.* Vincent, 202 Pac. 655 (Cal., 1921). — The defendant, by a deed made in California, conveyed to the plaintiff land situated in Washington. By the law of Washington a deed containing the words "grant, bargain, sell, and convey" imports an express covenant of quiet enjoyment. (1915 REM. CODE, § 8748). The plaintiff, having been prevented from taking possession because of the superior right of third parties, sued in California, alleging a breach of this covenant. The defendant's demurrer, on the ground that no cause of action was shown by the law of California, was sustained. *Held*, that the judgment be reversed.

[3] *Per* Holmes, J., in Polson *v.* Stewart, 167 Mass. 211, 214, 45 N. E. 737, 738 (1897). See also Robinson *v.* Suburban Brick Co., 127 Fed. 804 (4th Circ., 1904); Clement *v.* Willett, 105 Minn. 267, 117 N. W. 491 (1908).